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No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

vs.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of South Carolina

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

This case involves the application to petitioner's coastal properties of the South Carolina Beachfront Management Act. That Act initially prohibited petitioner from building permanent, habitable structures on his parcels seaward of a setback line established by respondent. The questions presented are:

1. Whether application of the Act, which was enacted in principal part to respond to documented safety-related hazards, results in a unconstitutional taking of petitioner's property for which compensation is required, where petitioner failed to contest the safety-related basis for the Act, and where his exclusive showing below related to the Act's effect on the value of his property.

2. Whether petitioner's permanent takings claim has been rendered moot as a result of 1990 amendments to the Act which afford petitioner the opportunity to develop his lots, and whether his constitutional claims, including any theory based on an alleged temporary taking of his property, remain ripe in light of the same amendments.

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INTEREST OF AMICUS STATE OF CALIFORNIA

Amicus State of California respectfully files this brief in support of respondent, pursuant to Rule 37.5 of the Rules of the Supreme Court of the United States.

Eighty-four years ago, Justice Oliver Wendell Holmes observed that the public interest in its natural resources is "omnipresent wherever there is a State, and grows more pressing as population grows." (*Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).)

That observation is especially compelling with reference to the State of California, its 58 counties and 467 cities. California seeks to accommodate an ever-burgeoning population, and to provide its citizens with the continued health and safety protection which remain the core function of the police power. California must also conserve the same natural resources which have made it a magnet for settlement and development over the last century and a half, and which are essential to serve the very population those resources attract.

California's population of over 30 million people – as compared to approximately 20 million in 1970 – is expected to exceed 36 million residents by the end of the century. (California Department of Finance, *Population estimates for California Cities and Counties* (1991); California Department of Finance, *Projected Total Population of California Counties, 1990-2005* (1991).) Yet it is an ineluctable fact that the state's natural resources remain finite. These competing realities frame the key challenge for California's leaders as they work to maintain both a healthy economy and an adequate quality of life for California's citizens.

The issues presented by this case are of fundamental importance to the State of California. A decision holding that the statute at issue violates applicable constitutional principles would greatly impair the ability of California and its political subdivisions to carry out the most critical and essential police power responsibilities. Adoption of

petitioner's sweeping reformulation of takings jurisprudence – that the sole, relevant criterion is the economic impact of a given regulation on private property – would cripple California's ability to carry out essential government programs upon which her citizens' health and safety quite literally depend.

Several brief examples are illustrative. California's Coastal Act (the state's analogue to the South Carolina Act at issue here) requires that new coastal development approved by state or local governments in California "[m]inimize risks to life and property in areas of high geologic, flood, and fire hazard." (Cal. Pub. Resources Code § 30253(1) (West 1991).) Under petitioner's view of the law, California could not prevent development in a known earthslide area, absent compensation, notwithstanding the potential for disaster for the public and adjoining landowners.

Similarly, in 1971 a major earthquake occurred in Southern California, causing the loss of 58 lives and $1,646,000,000 in property damage. (California Seismic Safety Council, *Loma Prieta's Call to Action* (1991) at p. 11.) In the wake of that natural disaster, California enacted legislation which, *inter alia*, discourages development atop known earthquake faults. (Cal. Public Resources Code § 2621 et seq. (West 1991).) If petitioner's position is embraced by this Court, such limits on construction on obviously hazardous sites could not be enforced absent compensation to a landowner whose property overlies an active earthquake fault.

The State of California is currently defending takings claims in the Lake Tahoe Basin in which hundreds of millions of dollars are sought from two states and a bistate planning agency.[1] That agency, created by the

[1] Tahoe Sierra Preservation Council, et al. v. Tahoe Regional Planning Agency, et al., Case Nos. CIV-R-84-257-ECR (D. Nev.), CIV-S-84-816-EJG (E.D. Cal.).

bistate Tahoe Regional Planning compact, limited development of highly-erodible mountainside areas, based on undisputed scientific evidence that such development would trigger pollution that would significantly impair the water quality of Lake Tahoe itself. (Fink, *Public Land Acquisition for Environmental Protection: Structuring a Program for the Lake Tahoe Basin*, 18 Ecology L. Q. 486, 503-504 (1991).) Despite the fact that Lake Tahoe is a publicly-owned natural resource of worldwide renown (principally due to its exceptional water quality), plaintiffs in the pending lawsuits – like petitioner herein – are effectively claiming a constitutional right to wreak environmental harm on the public unless government pays them not to do so.

Toxic substance control is another context in which petitioner's theory, if adopted, would have untoward consequences. Under California law, state officials can initiate procedures to have property declared as contaminated if hazardous waste is located on or immediately adjacent to the property. That procedure requires notification of affected landowners and a hearing. If successful, the end result is to restrict future uses of the property and to require the execution of restrictive covenants. (See Cal. Health & Safety Code §§ 25220 et seq., 25359.5 (West 1991).) Reversal of the decision below could place the State of California in the intolerable position of either exposing its citizens to risk of exposure to toxic substances by allowing development of the site to proceed or, alternatively, compelling state purchase of the contaminated property.

The implications of petitioner's sweeping contentions are not limited to land use regulation. For example, California has a comprehensive system of food and pesticide regulation designed to insure that the state's agricultural products are safe for the buying public nationwide which consumes California fruits and vegetables. (See, e.g., Cal. Food & Agriculture Code §§ 12641 et seq., 12961 et seq. (West 1991).) The logical extension of petitioner's argument is that this regulatory program – which forms a

cornerstone of California's most important industry – could no longer be enforced absent compensation to the owner of the contaminated food or hazardous pesticide. Such a result is neither rational nor, as discussed below, consistent with existing law.[2]

STATEMENT OF THE CASE

Amicus State of California adopts respondent's statement of the case.

SUMMARY OF ARGUMENT

1. For over a century, this Court has recognized that in instances where government acts to abate a nuisance or to prevent conduct tantamount to a nuisance, no unconstitutional taking transpires even if the value of affected

[2] Furthermore, longstanding principles of state law afford Californians legal recourse in certain instances where state or local officials have failed to provide adequately for their constituents' health and safety. (See, e.g., *Smith v. County of Los Angeles*, 214 Cal.App.3d 266, 262 Cal.Rptr. 754 (1991) (upholding cause of action against county for earthslide damage allegedly caused as result of county's efforts to respond to damage from prior natural disaster); *Potter v. City of Oceanside*, 114 Cal.App.3d 564, 170 Cal.Rptr. 753 (1981).)

Similarly, the dictates of federal law often compel state health and safety-related responses which have the effect of limiting private property rights. E.g., Federal Coastal Zone Management Act, 16 U.S.C. §§ 1452(2)(B), 1458(a).

Demands on California's already-strained fiscal resources will be further exacerbated if those who are allowed to build in harm's way are thereafter free to seek financial recourse from the government once disaster strikes. Adoption of petitioner's extreme theory would hamstring the State of California's ability reasonably to prevent health and safety hazards and to comply with federal mandates, while leaving the state exposed under state law to liability accruing from the inevitable lawsuits filed by California citizens against the government that failed to protect them from those hazards.

private property is substantially diminished or eliminated. This principle, which also has strong antecedents in venerable common law doctrine, makes possible the most fundamental role of government: protecting its citizens from hazards to public health and safety. It also is predicated upon the longstanding principle that one has no right – constitutional or otherwise – to make use of his or her property in such a way as to injure other property owners or the public.

It is equally settled, however, that the nuisance exception to the Takings Clause is not coextensive with the police power. In determining whether a given regulation properly falls within the nuisance exception to the Takings Clause, the proper judicial inquiry is whether a primary purpose of the measure is to protect public health or safety. Moreover, the government's health and safety objectives of such a program must be objectively verifiable by a reviewing court for the nuisance exception to apply.

2. The record below reveals that petitioner assiduously avoided any challenge to the health and safety-based underpinnings of the South Carolina Beachfront Management Act. Instead, petitioner focused his takings challenge exclusively on one facet of that Act's impact on his property: the extent to which the Act diminished the economic value of his lots. Only before *this* Court has petitioner altered his litigation strategy and broadened his constitutional challenge. Here he argues – for the first time – that the Act's setback requirements fail because they are predicated on police power objectives other than those found both extant and compelling by the South Carolina Supreme Court.

Petitioner's stratagem must fail for two reasons: first, he has waived his right to challenge the justification for the Act's setback requirements and conceded the issue below. Second, even if this Court were to relieve petitioner of that concession, the proper disposition under established principles of federalism and comity is for the Court to remand the case to the South Carolina courts for further proceedings on that issue.

3. If the Court determines that the nuisance exception is for some reason inapplicable to the present case,

petitioner's takings claim is properly resolved by reference to the multi-faceted standard articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Petitioner errs in contending that his takings claim should be resolved solely by reference to the South Carolina Act's economic impact on his property. The character of the governmental action and petitioner's reasonable investment-backed expectations are also essential factors in the takings equation. Since those factors have not been fully developed on the present record, the case should be remanded to the lower courts if this Court finds the *Penn Central* standard applicable here.

4. The procedural posture of this case deprives it of the justiciability required for review by the Court. First, petitioner's claim of a permanent taking resulting from the 1988 Act is moot because subsequent amendments have substantially altered the Act's impact on petitioner's property. Those amendments plainly allow petitioner to submit a development application for review. Second, any takings claim based on the current law is not ripe, because petitioner has never submitted such an application. Finally, petitioner may not now raise potential issues concerning a "temporary taking" because, pursuant to the parties' stipulation below, that claim has never been presented to the South Carolina courts.

ARGUMENT

I.

GOVERNMENT REGULATION DESIGNED TO PREVENT OR LIMIT PRIVATE ACTIVITIES THAT THREATEN PUBLIC HEALTH OR SAFETY DO NOT CONSTITUTE COMPENSABLE TAKINGS, REGARDLESS OF THEIR ECONOMIC IMPACT ON AFFECTED PROPERTY.

A. The "Nuisance Exception" to Takings Jurisprudence is Both Longstanding and Well-Established.

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use

without just compensation." The Takings Clause has been made applicable to state and local governments through the due process conduit of the Fourteenth Amendment. (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).)

Constitutional scholars have established that the drafters of the Takings Clause "intended the clause to have narrow legal consequences: It was to apply only to the federal government and only to physical takings." (Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 708 (1985); Hagman and Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation*, (1978), pp. 256, 272.) Nevertheless, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and related cases, this Court identified the doctrine of "regulatory takings." Speaking for the Court in *Pennsylvania Coal*, Justice Holmes opined that regulation which "goes too far" can result in a taking of private property requiring compensation, notwithstanding the fact that title to and use of the regulated property remains with its private owner. (260 U.S. at 393; see also, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-317 (1987).)

1. The Takings Clause and the case law which has developed under it reflect the inevitable tension between the right of the individual citizen to utilize private property and the unquestioned need for government to exercise its police power to protect the general public. (*Armstrong v. United States*, 364 U.S. 40, 49 (1960).) Perhaps in light of this ever-present conflict, the Court has repeatedly professed itself unable to develop bright line rules that will always provide clear guidance as to when a regulatory taking transpires. (See, e.g., *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Pennsylvania Coal, supra*, 260 U.S. 393, 416 ("this is a question of degree – and therefore cannot be disposed of by general propositions").) Particularly in close cases, a balancing of interests and an "ad hoc factual inquiry" are required under applicable constitutional principles.

(*Penn Central, supra,* 438 U.S. at 124; *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979).)

Nevertheless, this Court has consistently recognized that in those instances where government acts to abate a nuisance or to prevent private action "tantamount to public nuisances," no unconstitutional taking transpires even if the value of affected private property is substantially diminished or eliminated. (*Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 491-492 (1987).)[3]

In *Keystone,* decided a mere five years ago, the Court reaffirmed over a century of jurisprudence, confirming the special deference accorded police power measures which eliminate or prevent tangible threats to the public's health and safety. Significantly, the dissent in *Keystone* did not take issue with the proposition – reaffirmed and applied by the majority – that certain health and safety-related regulatory programs are valid under the Takings Clause notwithstanding their economic impact: "[W]e have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." (480 U.S. at 511 (Rehnquist, C.J., dissenting); see also, *First English, supra,* 482 U.S. 304, 313 (remanding to state court issue of "whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the State's authority to enact safety regulations.").)

Keystone is no aberration. That case, rather, reflects the Court's longstanding adherence to a fundamental principle of takings law: that the Fifth Amendment does not confer on private parties a constitutional right to use

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[3] The exception finds its source in the origins of nuisance law, which is concerned with the prevention of harm to others. This cannot reasonably be equated with "public *use*" of private property for which compensation is required under the Takings Clause. See discussion, *infra.*

their property in such a way as to injure their neighbors or the public. It has long been a part of this nation's jurisprudence that no one is entitled to use their property so as to cause harm to others:

> "[The police power] rests upon the fundamental principle that every one shall so use his own [property] as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions." (*Northwestern Fertilizing Co. v. Hyde Park,* 97 U.S. 659, 667 (1879).)

As this Court observed early in this century:

> "Under such circumstances the State, in the exercise of the police power, may legitimately extend the application of the principle that underlies the maxim *sic utere tuo ut alienum non loedas* [use your own property in such manner as not to injure that of another], so far as may be requisite for protection of the public . . . [T]he enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation . . . " (*Atlantic Coast Line v. Goldsboro,* 232 U.S. 548, 558-559 (1914).)

Most commentators (and, indeed, the Court itself) cite the Supreme Court's 1887 decision in *Mugler v. Kansas,* 123 U.S. 623 (1887) as the first case to explicitly recognize the "nuisance exception" to the Takings Clause. (See *Penn Central, supra,* 438 U.S. at 144-145 (Rehnquist, C.J., dissenting.[4]) In *Mugler,* the Court upheld against constitutional challenge the state's power to close a profitable brewery. Justice Harlan, speaking for a unanimous Court in *Mugler* on this point, observed:

> "[A]ll property in this country is held under the implied obligation that the owner's use of it

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[4] But see *Northwestern Fertilizing Co. v. Hyde Park, supra,* cited and relied upon in *Mugler* (123 U.S. at 666-667); see also, *Patterson v. Kentucky,* 97 U.S. 501 (1878); and state court cases cited *infra.*

> shall not be injurious to the community . . . " A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." (123 U.S. at 668-669.)

Over the following 100 years, the Court has applied the nuisance exception to reject a variety of Takings Clause challenges. In each case the Court found that the health and safety-based objectives of the regulatory programs being challenged insulated them from constitutional attack. (See, e.g., *Welch v. Swasey*, 214 U.S. 91 (1909) (municipal height limitation); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914) (miner safety regulation); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (urban ban on livery stables); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (dismissing takings challenge to city ordinance which required closure of profitable brickyard, thereby reducing economic value of property by 92.5 per cent); *Gorieb v. Fox*, 274 U.S. 603 (1927) (municipal setback regulations); *Miller v. Schoene*, 276 U.S. 272 (1928) (finding no taking where state had required landowner to cut down infected trees in order to prevent disease's spread to other properties. "where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.").)

The contention – advanced by petitioner and others – that the Court's decision in *Pennsylvania Coal* somehow overruled these precedents *sub silentio* is simply nonsensical in light of the Court's subsequent cases. For example, Justice Holmes, who authored the *Pennsylvania Coal* decision, also joined in the opinions in *Gorieb* and *Schoene*, discussed above.[5] Even more compelling is the fact that

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[5] That Justice Holmes did not view the Takings Clause as an inflexible bar to all health and safety-based regulation is

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this Court has regularly reaffirmed and applied the nuisance exception in a number of modern Takings Clause cases. (See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-596 (1962); *Penn Central, supra*, 438 U.S. 104, 125; *Keystone, supra*.)

2. The nuisance exception to the Takings Clause finds its antecedents in venerable common law doctrine. The principles announced in *Mugler, et al.*, are predicated to a substantial degree on Anglo-American principles of tort and property law. (See. e.g., Prosser, *Law of Torts*, (4th ed. 1971), § 57; *Restatement (Second) of Torts* §§ 364-371.) This is particularly relevant in light of the fact that property rights are themselves fundamentally a creature of state, rather than federal, law. (*Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 20 (1990) (O'Connor, J., concurring).)

3. Not surprisingly, the principle that no taking exists when government acts to prevent threats to public health and safety – irrespective of economic impact on private parties – is firmly embedded in state law precedents as well. Many such state decisions, in fact, predate and presage *Mugler*. In *Commonwealth v. Alger*, 61 Mass. 53 (1851), the Massachusetts court upheld an ordinance which prohibited construction of wharves beyond a prescribed harbor line, on the ground that such structures

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underscored by a number of his other opinions. See, e.g., *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-238 (1907) ("the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."); *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) ("It is a fair and reasonable demand on the part of a sovereign that the air over its territory not be polluted . . . that the forests on its mountains . . . shall not be further destroyed or threatened by the acts of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.")

constituted a public nuisance. (See also, *Stuyvesant v. Mayor of New York*, 7 Cow. 585 (1827) (upholding on public health grounds ordinance banning burials in certain portions of New York City); *People v. Hawley*, 3 Mich. 330 (1854).)

Twentieth century state court precedents are similarly in accord. For example, in *Consolidated Rock products v. City of Los Angeles*, 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962), the California Supreme Court found that a rock and gravel quarry within city limits was properly banned on public health and pollution hazard grounds, notwithstanding the absence of an alternative economic use. Also noteworthy is *Milardo v. Coastal Resources Management Council of Rhode Island*, 434 A.2d 266, 269-270 (R.I. 1981), in which the Rhode Island Supreme Court rejected a developer's challenge to an administrative denial of a sewer system permit, where evidence showed the effect would be to pollute an adjoining marsh:

> "In essence, plaintiff is asserting a right not only to use his property but also to discharge waste into the surrounding area. This is a 'property right' that this court [has] refused to recognize . . . We believe that this denial was an exercise of the police power for protection of the public health and safety."

(See also, *Nassr v. Commonwealth*, 394 Mass. 767, 477 N.E.2d 987 (1985) (hazardous waste site); *Eno v. Burlington*, 125 Vt. 8, 209 A.2d 499 (1965) (unsafe structure).)

4. Accordingly, it is far too late in the history of takings law to assert – as petitioner unabashedly does – that the nuisance exception to the Takings Clause is nonexistent. (Petitioner's Brief at pp. 11-14.) As the Solicitor General correctly observes:

> "The roots of the [nuisance exception to the Takings Clause] extend deep into the Court's precedents and historical definitions of private property rights, and into the correlative power

> of the government to abate nuisances and protect public health and safety from serious harm." (Brief of Solicitor General at p. 15.)

This Court recently confirmed this very principle in *Keystone, supra*. There the Court explicitly rejected the identical argument advanced by petitioner in the present case: that *Pennsylvania Coal* had somehow implicitly overruled *Mugler* and its progeny. (480 U.S. 470, 490.) Citing *Mugler*, the Court in *Keystone* held:

> "Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' . . . and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." (480 U.S. at 491-492.)[6]

In summary, longstanding Supreme Court jurisprudence confirms the nuisance exception to the Takings Clause. Under that exception, the state is not required to pay compensation to a private property owner if the regulation at issue is imposed in order to prevent or address a threat to public health or safety. And this is true

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[6] Perhaps aware of the frailty of his argument-in-chief, petitioner makes the equally remarkable contention that although the nuisance exception may in fact be applicable with respect to *facial* takings challenges, it has no relevance to *as-applied* takings claims such as that he posits in the present litigation. See Petitioner's Brief at 16-19.

The purported distinction is both spurious and lacking in any precedential support. It makes no sense to argue that while government may enact a law banning tainted food from the marketplace, it cannot enforce the law without paying for the contaminated food. Not surprisingly, petitioner cites no support for this startling proposition. To the contrary, many of the cases in which the courts have invoked the nuisance exception involve as-applied takings claims. See, e.g., *Goldblatt, supra; Miller v. Schoene, supra.*

even if the impact of the regulation is to substantially diminish or eliminate the value of affected private property. Accordingly, petitioner's importunings to the Court to ignore *stare decisis* and reverse over a century of settled precedent in this area should be squarely rejected.

B. The Nuisance Exception is Properly Limited to Those Police Power Measures Which Are Based in Principal Part on Objectively-Verifiable Health and Safety Concerns.

To conclude that the nuisance exception to the Takings Clause remains fully viable does not, however, end the constitutional inquiry. It remains to be determined whether a particular regulatory measure properly fits within that limited exception to the Fifth Amendment's compensation requirement.[7]

1. It is by now axiomatic that the nuisance exception is not co-extensive with the state's police power. (*Keystone, supra,* 480 U.S. at 491 n.20; *Penn Central, supra,* 438 U.S. at 145 (Rehnquist, J., dissenting).) Accordingly, not all regulatory programs are of a nature which fall within the nuisance exception.

The proper inquiry, we submit, is whether a primary purpose of a particular government regulation is to protect public health or safety, and whether the regulation is reasonably related to that purpose. The health and safety risks to be addressed by such a program must be objectively verifiable in order for the program to be encompassed within the nuisance exception.

Conversely, if the principal purpose of a government regulation is to promote non-health and safety concerns –

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[7] As is explained *infra,* petitioner has effectively waived his right to pursue this point before the Court. This is because he conceded the compelling objectives of the South Carolina Act in the trial court, opting instead to focus his takings challenge exclusively on the economic impact to his property of the Act. See discussion at pp. 20-22, *infra.*

such as economic or aesthetic interests – that regulation is beyond the scope of the nuisance exception. Such a regulatory program – assuming it does not effect a physical occupation of private property (*cf. Kaiser Aetna v. United States, supra,* 444 U.S. 164, 180) – is instead properly analyzed under the multifaceted criteria identified in *Penn Central, supra,* 438 U.S. at 124.[8]

This distinction becomes more apparent by comparing certain examples. For example, a state statute which prohibits the manufacture of hazardous weapons materials adjacent to schools would come within the nuisance exception. Similarly, a regulation authorizing government seizure and destruction of seriously-diseased livestock passes constitutional muster under *Keystone* and related precedents. Government certainly has the ability, consistent with constitutional rights of private property, to ban activities which so directly threaten the public welfare.

Properly protective or preventative measures can be contrasted against those government programs which have as their objective the redistribution of economic resources, the conferring of public benefits, or promotion of aesthetic concerns. Examples of such regulatory programs which this Court has recently reviewed include rent control (*Pennell v. City of San Jose,* 485 U.S. 1 (1988); *Fisher v. City of Berkeley,* 475 U.S. 260 (1986); *Yee v. City of Escondido,* No. 90-1947); certain redistributions of economic wealth (*Bowen v. Gilliard,* 483 U.S. 587 (1987) (welfare benefits); *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984) (land reform)); and billboard control (*Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981)). It is beyond reasonable dispute that each such program falls within the constitutional scope of the police power, and this Court has so held. However, we do not believe that any of these public purposes can reasonably be equated with the nuisance exception embraced in *Mugler, Keystone,* et al. Rather, in reviewing each such non-health

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[8] See discussion at pp. 23-26, *infra.*

and safety-related measure, takings jurisprudence requires application of the several factors identified in *Penn Central*: not only the character of the governmental action, but also the economic impact of the regulation and the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations. (438 U.S. at 124.) In such a situation, an admittedly valid exercise of the police power may nevertheless result in a taking; consequently, compensation could be required on the facts of a given case. (See, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987).)

The nuisance exception, on the other hand, encompasses a far narrower universe of government purposes and programs. Health and safety concerns to which that exception is applicable under the *Mugler/Keystone* standard include: prevention of water pollution (*Goldblatt*); dangerous subsidence (*Keystone*); air pollution (*Northwestern Laundry v. Des Moines*, 239 U.S. 486 (1916); floodplain zoning (*Adolph v. Federal Emergency Management Agency of the United States*, 854 F.2d 732 (5th Cir. 1988); *Turner v. County of Del Norte*, 24 Cal.App.3d 311, 101 Cal.Rptr. 93 (1972)); and erosion control (*Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991), *petition for cert. pending; McNulty v. Town of Indialantic*, 727 F.Supp. 604 (M.D.Fla. 1989)).

2. Of course, there will be instances in which the judiciary is confronted with takings challenges to regulatory programs whose objectives are unclear, multifaceted or both. We believe several principles are useful in examining such a case.

First, the courts should look to the objectives cited by the legislative body responsible for promulgating the program under review. These objectives are to be gleaned from the legislative history or, preferably, from the legislative findings adopted as part of the measure itself.

Second, substantial deference must be given to those legislative findings and judgments, under settled separation of powers principles. That such deference is required in takings cases is well-established. (*Euclid v. Ambler*

Realty Co., 272 U.S. 365, 388-389 (1926); *Keystone, supra*, 480 U.S. 470, 511 n.3 (Rehnquist, C.J., dissenting).) Nevertheless, judicial deference is not without limits, and the question of whether a measure reasonably relates to a legitimate health and safety objective ultimately rests with the judiciary, not the legislature. (See, e.g., *Keystone, supra*, 480 U.S. 470, 487 n.16: "*Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose.") This Court has recently indicated that the judiciary is obliged to examine closely the fit between the challenged regulation and the claimed state objective. (*Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); see also, *Penn Central*, 438 U.S. 104, 127.) Such a "hard look" is similarly appropriate in reviewing government's claim that a given regulation is predicated upon objectively-verifiable health and safety concerns.

Third, there will be instances, like the present case, in which a regulation is justified on *both* health and safety concerns and unrelated, albeit legitimate, purposes. In such instances, we believe the proper course is first to undertake the above analysis of the existence and legitimacy of health and safety objectives. For if a regulation *does* advance documented, legitimate health and safety-based concerns, the *Mugler/Keystone* standard is satisfied. This is true even if aesthetic, economic or similar objectives are simultaneously furthered by the measure. Stated another way, the mere fact that a regulation serves collateral as well as core public purposes should not diminish the standing of such a regulation for purposes of judicial review under the Takings Clause.[9]

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[9] For example, the principal purpose of a land use ordinance preventing development on steep mountainsides with a history of earthslides is to prevent damage to the community below the mountain. Such a measure should qualify under the nuisance exception to the Takings Clause, despite the fact that it arguably may also foster the aesthetic and open space objectives of the community.

Fourth, the question of whether a given activity is akin to a nuisance for purposes of the *Mugler/Keystone* exception cannot be viewed in the abstract. As Justice Brennan observed for the Court in *Penn Central*, this is part of the "ad hoc, factual inquiry" essential in takings cases. (438 U.S. at 124.) Moreover, what qualifies as a nuisance-type activity often depends on where that activity is situated. As Justice Sutherland observed in *Euclid v. Ambler Realty Co., supra*, 272 U.S. 365, 368, "a nuisance may be merely a right thing in the wrong place, like a pig in a parlor instead of the barnyard." Accordingly, prohibiting a chemical plant in a residential neighborhood may well fall within the scope of the nuisance exception, while excluding such an operation from an industrial area might not. Similarly, a ban on residential home construction in an earthquake or erosion-prone area would fit within the *Mugler/Keystone* standard, whereas residential development in non-hazardous areas would not.

Finally, it is well-established that although the nuisance exception derives from the common law, the applicability of the exception need not be determined strictly according to common law standards. Historically, property may have been used in ways which scientific discoveries or technological advances now clearly demonstrate are harmful to the public. (Asbestos in construction activities is one prominent example.) This Court has recognized this venerable principle on several occasions. (See, e.g., *Missouri v. Illinois*, 200 U.S. 496, 522 (1906), superceded by statute as stated in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Miller v. Schoene, supra*, 276 U.S. 272, 280.) The principle is rooted in the necessary flexibility of the police power:

> "A vested interest cannot be asserted against [the police power] because of conditions once obtaining . . . To so hold would preclude development and fix a city forever in its primitive conditions." (*Hadacheck, supra*, 293 U.S. at 410.)

Justice Black made a similar observation in the context of a takings challenge:

> "[T]he solution of the problems precipitated by these technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts." (*United States v. Causby*, 328 U.S. 256, 274 (1946) (Black, J., dissenting.).)

This does not mean, of course, that the nuisance exception to the Takings Clause will necessarily expand in scope as scientific advances demonstrate new threats to public health and safety. While modern technology will doubtless continue to reveal such dangers from previously-undetected sources, it is equally true that the passage of time and those same technological advances serve to eliminate other types of once-feared public health and safety concerns. For example, modern zoning and open space ordinances – perhaps the most common form of aesthetic-based regulation, which would for the most part seem to be beyond the scope of the nuisance exception – find their historical roots in measures designed to forestall far more tangible threats such as "fire, panic, and other dangers . . . " (Sax, *Some Thoughts on the Decline of Private Property*, 58 Wash. L.R. 481, 490-491 (1983).) While municipal height limitations are now generally predicated primarily on aesthetic grounds (*Haas v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979)), this Court upheld them early in this century on the then-compelling ground that excessively-tall buildings in an urban setting constituted a special fire hazard. (*Welch v. Swasey*, 214 U.S. 91, 107-108 (1909).)

3. Accordingly, the nature of societal problems that give rise to the nuisance exception will continue to evolve; this evolution is intrinsic to the necessary elasticity of the police power itself. However, the nuisance exception and the police power are not and never have been coterminous. Not every exercise of the latter falls within the nuisance exception. The ultimate question in

each case is whether an underlying, primary purpose of a particular regulatory program is to prevent uses of property that are harmful to the public health and safety.

II.

THIS COURT SHOULD NOT BE REQUIRED TO DETERMINE WHETHER APPLICATION OF THE SOUTH CAROLINA STATUTE TO PETITIONER'S PROPERTY QUALIFIES UNDER THE NUISANCE EXCEPTION; IF DEFERENCE TO THE STATE COURT'S FINDING CANNOT BE MADE, THE PROPER DISPOSITION IS TO REMAND FOR FURTHER PROCEEDINGS.

A. Petitioner Failed to Address the Heath and Safety-Based Justification for the South Carolina Beachfront Management Act in the State Courts; He Has Therefore Waived the Ability to Dispute the Issue Before This Court.

Both at trial and on appeal to the South Carolina Supreme Court, petitioner embarked upon a single-minded litigation strategy: he argued the unconstitutionality of the Beachfront Management Act, as applied to his property, based exclusively on the adverse economic impact of the Act upon that property. (Tr. 19-80, 94; Resp. Br. S.C. Sup. Ct. at p. 2.) Petitioner assiduously avoided raising any issue concerning the character of the governmental action or the extent to which they interfered with petitioner's reasonable investment-backed expectations. Indeed, he repeatedly conceded the validity of the public purposes relied upon by the South Carolina Legislature in enacting the statute and by respondent in enforcing it. (*Ibid.*)

Having embarked upon such an extreme and unprecedented theory, petitioner cannot now be heard to complain that the South Carolina Supreme Court misread the goals and objectives of the Act. Petitioner has conceded that respondent was acting, within its police power, to prevent actions akin to a public nuisance. This is the position respondent adopted below, and it was properly

accepted by the South Carolina Supreme Court. (404 S.E.2d 895, 898.) It is therefore especially unseemly for petitioner to fault the South Carolina Supreme Court for the latter's finding that the Act's setback requirement falls within the nuisance exception to the Takings Clause. (E.g., Petitioner's Brief at pp. 35, 44.) Having failed below to rebut or even address respondent's argument to the contrary,[10] petitioner cannot legitimately shift his litigation strategy at this juncture and fault the lower court for reaching a conclusion which petitioner steadfastly refused to address.

Nor is petitioner accurate in accusing the lower court of having "converted a complex [takings] inquiry into a bright-line test." (*Id.* at p. 9.) That is in fact precisely what petitioner sought to do – albeit unsuccessfully – in arguing below the radical and unsupported view that a regulation's economic impact on property is the sole appropriate criterion in a takings claim.

This Court has repeatedly admonished that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." (*Street v. New York*, 394 U.S. 576, 582 (1969); Supreme Court Rule 21.1(h).) It is essential that a federal question be raised, presented and pursued in a timely and proper manner at the appropriate stage of the state court proceedings if it is to be preserved for Supreme Court review. (*Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); see also Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986) at pp. 149-151.)

This case demonstrates the wisdom of that rule. Petitioner utterly failed to challenge the nuisance-type underpinnings of the Act's setback requirements in the state

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[10] Indeed, petitioner *objected* on relevancy grounds when respondent's counsel attempted to introduce evidence at trial as to the public purposes underlying the Act's setback requirements. See Tr. 94-97.

courts. He is therefore barred from doing so at this juncture, and the decision below should be affirmed on that basis.

B. If the Court Believes There is an Inadequate Record Regarding the Character of the South Carolina Statute or Related Points, the Proper Disposition is to Remand the Case to the State Courts for Further Proceedings.

If this Court nonetheless believes that the South Carolina Supreme Court's examination of the 1988 Act was somehow deficient, the proper disposition is to remand the case to the South Carolina Supreme Court for further proceedings.[11] Such a remand would permit the state court to determine in the first instance whether the nuisance exception applies in the present case.[12]

This result is fully consonant with traditional principles of federalism. The Court has regularly observed that state courts should appropriately construe and examine state legislation and regulation in the first instance. (E.g., *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Lehman Brothers v. Schein*, 416 U.S. 386, 390-391 (1974).)

A remand is also consistent with the Court's oft-cited concern for judicial economy and efficiency. Specifically, lower courts should determine factual issues. This is not an activity which the appellate courts – and especially this Court – have the time and ability to perform. (See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, supra*, 482 U.S. 307, 313-314, in which the Court remanded the case to the state courts for

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[11] To the extent further development of the factual record is deemed to be required, the South Carolina Supreme Court could in turn remand the case to the trial court for additional evidentiary proceedings.

[12] A remand would also seem appropriate in order to permit a review of the extent to which the 1990 amendments to the Act affect petitioner's takings claim. See discussion at pp. 27-30, *infra*.

a determination as to whether the ordinance at issue was justified under the nuisance exception to the Takings Clause; see generally, Wright, *Law of Federal Courts* (West 4th ed. 1983), § 96.)

It would be singularly inappropriate for this Court to examine the extent to which the Act does or does not fall within the *Mugler/Keystone* nuisance exception in the first instance, before the South Carolina courts have had an opportunity to review their own statute for that purpose. Accordingly, if this Court believes the issue of the Act's efficacy has properly been raised and preserved, the case should be remanded for further state court proceedings on that issue.

III.

IF THE COURT SHOULD FIND THE NUISANCE EXCEPTION INAPPLICABLE TO THE PRESENT CASE, THE *PENN CENTRAL* "BALANCING OF INTERESTS" TEST WOULD APPLY

1. This Court has long and consistently held that the question of whether government is required to pay compensation for restrictions imposed on private property must be resolved by a case-by-case balancing of public and private interests. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962). In the case of preventing or abating nuisances, the state interests are, as explained above, necessarily superior to those of the property owner. In other cases, the public needs and interests served by the restrictions must be balanced against the burdens imposed on the property owner as defined by his or her reasonable investment-backed expectations and the economic impact caused by the regulation.

Petitioner argues, however, for a more simplistic test. He contends the government must reimburse a property owner for any diminution in the property's value due to

regulation, regardless of the interests served and regardless of the owner's reasonable investment-backed expectations. Such a rule would quite literally destroy the ability of government to govern effectively. As the Court noted in *Pennsylvania Coal, supra,* 260 U.S. at 413:

> "[G]overnment hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

This Court, over many years, has fashioned a workable and practical test by which property owners, legislators and the public can predict, and the judiciary can decide, whether government legislation has imposed such a severe restriction on the use of property that the people must pay. The Court should not accept petitioner's request that it destroy that craftsmanship.

The classic statement of the balancing test is found in *Penn Central Transportation Company v. City of New York, supra*:

> "[W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' . . .
>
> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action."

Id. at 124 (citations omitted).

The Court has alternately stated the applicable standard in *Agins v. City of Tiburon, supra,* 447 U.S. at 260 as whether the regulation "does not substantially advance

legitimate state interests [citation] or denies an owner economically viable use of his land . . . "[13]

Many other cases decided by this Court have applied this basic test to takings claims. See, e.g., *Andrus v. Allard,* 444 U.S. 51, 65 (1979); *Kaiser Aetna v. United States,* 444 U.S. 164 at 175 (1979); *Nollan v. California Coastal Commission, supra; Connolly v. Pension Benefit Guaranty Corp., supra,* 475 U.S. 211, 224; *Ruckelshaus v. Monsanto Co., supra.*)

2. The need to preserve to the courts the ability to weigh the full facts is essential to the legitimate land use planning objectives of state and local governments. Concurrent with an evaluation of the economic impacts of a regulation on a particular piece of property, courts must have the ability to review the facts compelling enactment of the regulation, along with the realistic expectations of the property owner who has alleged an unconstitutional deprivation. Without these components of the *Penn Central* and *Agins* formula, "justice and fairness" could never properly be served; the balance would always tilt in the direction of the property owner, no matter how attenuated his hopes of using the land or how compelling the state interest.

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[13] The Court in decisions subsequent to *Penn Central* and *Agins* has occasionally cited one formulation of the multifaced test or another. *Cf. Bowen v. Gilliard, supra,* 483 U.S. 587, 606 (1987) and *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211, 224-225 (1986) (citing *Penn Central* formulation of standard) with *Nollan, supra,* 483 U.S. at 834 (citing *Agins*). In any event, we believe these statements effectively require the same balancing of public and private interests. Indeed, the Court itself has so construed the operative *Penn Central* and *Agins* language. See *Keystone, supra,* 480 U.S. at 470. Under the *Penn Central/Agins* test, in the event a regulatory measure deprives the property owner of substantially all economic use, it is likely that a compensable taking will be found to have transpired unless consideration of the other applicable criteria strongly compel a contrary result.

For example, development of arid land, unsuitable for agriculture and far from existing cities, requiring massive public sector investment to provide basic urban services, could not under petitioner's theory be subjected to even the most traditional restrictions on density, height, and so forth. This is because compliance with such restrictions would preclude profitable development, given the tremendous infrastructure costs. Measurement purely of the economic impacts would thus prevent regulation of lands *most* ill-suited for development. It could also in effect make government the guarantor of an investor's profits, since any diminution in value resulting from governmental action would necessarily require reimbursement by the state. This in turn could encourage improvident speculation by investors comfortable in the knowledge that, no matter how likely their property would be subject to reasonable government restrictions, the government will nevertheless have to pay for those restrictions.

There is thus no basis in the law, and no support in logic or reason, for petitioner's suggestion that this Court adopt a test for determining when a taking has occurred that measures the economic impact of a government regulation on a property owner to the exclusion of the other components of the *Penn Central/Agins* test.

Since the facts necessary to apply the *Penn Central/Agins* test have not been developed on the present record, the Court should follow the suggestion of the Solicitor General and remand this proceeding to the South Carolina courts for further development of the evidence, if the Court determines that the nuisance exception does not apply for any reason. (See discussion in part II, *supra*.)

IV.

PETITIONER'S PERMANENT TAKINGS CLAIM IS MOOT TO THE EXTENT IT IS BASED ON THE 1988 ACT AND UNRIPE TO THE EXTENT IT IS BASED ON THE 1990 AMENDMENTS TO THE SOUTH CAROLINA ACT.

The procedural posture of this case deprives it of the justiciability required for review by this Court, both under established principles of mootness and ripeness.

A. This Controversy Is Moot Because The 1990 Amendments to The Act Permitting Construction on Petitioner's Property Have Eviscerated Petitioner's Permanent Takings Challenge to the 1988 Act.

Mootness principles incorporate Article III's "case and controversy" requirement, as well as precepts of judicial restraint and economy. (*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602 (1982); see generally, Wright, Miller & Cooper, 13 *Federal Practice and Procedure*, § 3533 et seq. (2d ed. 1984).) An actual controversy must be extant at all stages of judicial review, not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). Courts must apply the law existing at the time the case reaches them, and take appropriate action when amendment of the statute or regulation renders the relief sought unnecessary or inappropriate. (*Cort v. Ash*, 422 U.S. 66, 74-76 (1975); *Dinsmore v. Southern Express Co.* 183 U.S. 115 (1901); Wright, Miller & Cooper, *supra*, § 3533.6.)

In 1990, during the pendency of petitioner's appeal to the South Carolina Supreme Court, the state legislature amended the 1988 Act to permit construction of habitable structures on beachfront lands, including the lots owned by petitioner. These amendments were designed to address the impacts that the setback rule would have on coastal property owners such as petitioner; he is now entitled to apply for a permit to build on his property.

Any permanent grievance that petitioner may validly have had because of the effects of the 1988 Act evaporated when South Carolina modified the Act. Property owners such as petitioner currently have an opportunity to pursue development of their land. Accordingly, petitioner can no longer maintain that the 1988 Act permanently deprived him of any chance to develop his land. (*See Fusari v. Steinberg*, 419 U.S. 379 (1975); *United States v. Munsingwear*, 340 U.S. 36 (1950).)

B. Petitioner's Permanent Takings Claim Does Not Meet this Court's Ripeness Criteria, Which Require Petitioner to Seek a Final Authoritative Decision, Including an Available Variance, Before Pursuing Relief Based on the U.S. Constitution.

Ripeness is a key jurisprudential threshold requirement which can and must be considered at the appellate level as well as in the trial court. (*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-189 (1985); *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340 (1986), Wright, Miller & Cooper, *supra*, at § 3532.3.) This Court has repeatedly noted the special importance in land use cases of first deciding whether the plaintiff has taken the necessary steps so that the Court knows what is and is not allowed to be done with the subject parcel. (*Ibid.*)

The Court has consistently held that a constitutional challenge to a land use regulation is not ripe where the property owner has failed to apply for a variance or to seek a determination of whether a permit would be issued by the regulating agency. (See *Agins v. City of Tiburon*, *supra*, 447 U.S. at 260 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 633 (1981); *MacDonald*, *supra*, 477 U.S. at 348-351 (1986).) This is not an arbitrary rule. As the Court has noted: "Our reluctance to examine takings claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause." (*Williamson*

County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 190 (1985).)

In the instant case, petitioner's permanent takings claim is not ripe because he has not sought relief under the provisions of the 1990 amendments, which provide a permit process that may well allow construction on his property. Section 48-39-290 of the Act, as amended in 1990, and Section R.30-15(F) of respondent's implementing regulations clearly give petitioner the right to seek a special permit allowing the very type of development on his land that he says he contemplated. Accordingly, the 1990 amendments provide petitioner a clear administrative avenue of relief. Yet petitioner has not pursued this option and, indeed, has filed no application whatsoever. Respondent has thus never been given the opportunity to determine under the 1990 statute whether and how residential development of the type contemplated by petitioner is consistent with state law. Thus it is premature to determine whether and how the Act has worked a permanent taking of his property requiring compensation.[14]

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[14] Petitioner advances the theory that he has at least suffered a "temporary taking" for which compensation is required. From this he contends that the case remains ripe for adjudication on the merits. (Petitioner's Brief on the Merits at pp. 27-28, n.5.) This ignores that fact that the South Carolina courts have never had an opportunity to deal with the discrete temporary takings issue because the parties stipulated in the trial court that respondent *reserved* the right to argue and contest any such challenge petitioner might later choose to advance. (Tr. 14, Stipulation 14.) Under these circumstances, petitioner should be required to litigate any such temporary takings claim in the first instance in the state courts. This would allow those tribunals to engage in the essentially fact-based inquiry as to whether a temporary taking has transpired under the facts and criteria identified in *First English*, *supra*, 482 U.S. at 322, *Agins v. City of Tiburon*, *supra*, 447 U.S. 255, 263, and related cases.

CONCLUSION

The decision of the South Carolina Supreme Court should therefore be affirmed, the petition should be dismissed as improvidently granted or, alternatively, the Court should remand this matter to the lower court for further proceedings.

Dated: January 30, 1992

Respectfully submitted,

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